A

HAIDAKOTA (M) SDN BHD

v.

TAN TIAM CHAI & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02 (IM)-1037-2008]

C

22 SEPTEMBER 2008

CIVIL PROCEDURE: *Costs - Security for costs ordered by High Court - Whether order oppressive to appellant company - Companies Act 1965, s. 351*

D

COMPANY LAW: *Suit by company - Security for costs ordered by High Court - Whether order oppressive to appellant company - Companies Act 1965, s. 351*

This was the appellant's appeals against the orders of the High E Court directing the appellant to provide security for costs in actions brought by it against the respondents.

Held (allowing the appeals)
Per Gopal Sri Ram JCA delivering the judgment of the F court:

(1) Section 351 of the Companies Act 1965 ('the Act') confers a very wide discretion on the High Court to order a company to provide security for costs in an action brought by it or G against it. There are settled guidelines upon which the discretion falls to be exercised. Firstly, the application for security for costs must be made with reasonable promptitude after the issue of the writ. Delay is a good reason for the court to exercise discretion against the parties applying for H security. Secondly, an order under s. 351 of the said Act should generally not be made where the making of it would be oppressive. This is particularly so in a case where the company has an arguable case. Thirdly, security for costs should not be ordered where there is absence of any *mala fide* I on the part of the plaintiff company in bringing its claim. Special attention should be paid to the balance that should be

drawn between exposing an innocent defendant to the expense of defending a claim against the risk of shutting out a plaintiff from ventilating a genuine grievance. (para 3)

(2) The appellant's claim against the first set of respondents was based on their alleged breach of fiduciary duties and against the second set of respondents for their voluntarily assisting in such breach. The appellant's claim could not by any stretch of imagination be described as frivolous and vexatious. Its answer to the application for security for costs was that it found itself in a financially strained position because of the respondents' acts and omissions. In the circumstances, it would be oppressive to require the alleged victim of serious wrongs committed upon it to be required to furnish security for costs in favour of those accused of having put the victim in the position in which the victim found itself. (para 4)

[High Court orders set aside. Respondents to pay appellant costs of appeals herein and those incurred in court below. By reason of way in which appeals were argued, taxing registrar of court herein directed to permit separate items of getting up in respect of each appeal. Deposit in court in each appeal to be refunded to appellant.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap perintah Mahkamah Tinggi kerana mengarahkan perayu supaya menyediakan jaminan kos dalam tuntutan yang dibawa oleh perayu terhadap responden.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 351 Akta Syarikat 1965 ('Akta') memberi budibicara yang luas kepada Mahkamah Tinggi untuk memerintahkan sesebuah syarikat menyediakan jaminan kos dalam sesuatu tindakan yang dibawa oleh atau terhadapnya. Terdapat panduan-panduan mantap di mana budibicara harus dilaksanakan. Pertama, permohonan untuk jaminan kos harus dibuat dengan kadar segera selepas writ dikeluarkan. Kelengahan adalah satu alasan kuat bagi mahkamah melaksanakan budibicara bertentangan dengan kehendak pihak yang memohon jaminan. Kedua, perintah di bawah s. 351 Akta umumnya tidak akan dibuat di mana pemberiannya merupakan satu penganiayaan. Ini terutamanya terpakai kepada kes-kes di mana syarikat mempunyai kes yang boleh dihujahkan. Ketiga,

jaminan kos tidak akan diperintahkan dalam ketiadaan *mala fide* di pihak syarikat plaintif dalam mendakwa tuntutannya. Perhatian khas harus diberi kepada imbangan yang boleh dicapai di antara mendedahkan seorang defendan yang tidak bersalah kepada perbelanjaan untuk membela tuntutan dan risiko menghalang plaintif dari mengemukakan satu tuntutan yang tulen.

(2) Tuntutan perayu terhadap kumpulan pertama responden adalah diasas kepada dakwaan pelanggaran tanggungjawab fidusiari oleh mereka dan terhadap kumpulan kedua responden kerana membantu pelanggaran tanggungjawab tersebut. Dipandang dari sudut apa sekalipun, tuntutan perayu tidak boleh diperihal sebagai remeh dan menyusahkan. Jawapan perayu kepada permohonan untuk jaminan kos adalah bahawa ia mendapati dirinya berada dalam kedudukan kewangan yang goyah disebabkan oleh perbuatan dan peninggalan responden. Dalam keadaan sedemikian, adalah satu penganiayaan untuk mengkehendaki perayu yang kelihatan dimangsakan oleh suatu kesalahan yang dilakukan terhadapnya untuk menyediakan jaminan kos untuk manfaat mereka yang didakwa telah meletakkan perayu dalam keadaannya itu.

[Perintah-perintah Mahkamah Tinggi diketepikan. Responden perlu membayar kos rayuan kepada perayu di sini dan di mahkamah di bawah. Mengambilkira cara rayuan dihujahkan, pendaftar mahkamah yang mentaksiri di arah untuk membenarkan item-item berasingan bagi setiap rayuan. Deposit di mahkamah bagi setiap rayuan dikembalikan kepada perayu.]

Case(s) referred to:

Kejuruteraan Taipan (M) Sdn Bhd v. Loh v. Loh Contruction Sdn Bhd [2007] 1 CLJ 210 HC ***(refd)***

Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732 HC ***(refd)***

Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd [1979] 1 LNS 84 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 351

(Civil Appeal No: W-02(IM)-1037-2008)

For the appellant - Chow Siew Wai; M/s Chooi Saw & Lim

For the respondent - Kunasegaran M; M/s Kuna & Co

(Civil Appeal No: W-02(IM)-1038-2008)
For the appellant - Chow Siew Wai; M/s Chooi Saw & Lim
For the respondent - S Sathanantha Kumar; M/s SS Kumar & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Trial No: D2-22-1642-2005]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA delivering judgment:

[1] This is the judgment of the court.

[2] An order directing security for costs is a discretionary order. The general principle upon which this court acts in appeals against such orders is that it will not interfere unless it is demonstrated that the primary judge had taken into account irrelevant considerations or failed to take into account relevant considerations or asked himself or herself the wrong question or misdirected himself or herself in law. The initial jurisdiction of this court is therefore one of review only. Once reasons for the exercise of discretion are given, this court is most reluctant to interfere with the decision of the judge at first instance. But this is a case where no reason has been given, so the matter is at large before us.

[3] The starting point is s. 351 of the Companies Act 1965 ("the Act") which confers a very wide discretion on the High Court to order a company to provide security for costs in an action brought by it or indeed against it. But the discretion is not untrammeled. Nor is it unprincipled. For there are settled guidelines upon which the discretion falls to be exercised. First, the application for security for costs must be made with reasonable promptitude after the issue of the writ. Delay is a good reason for the court to exercise discretion against the parties applying for security. See *Kejuruteraan Taipan (M) Sdn Bhd v. Loh & Loh Contruction Sdn Bhd* [2007] 1 CLJ 210. Second, an order under s. 351 of the Act should generally not be made where the making of it would be oppressive. This is particularly so in a case where the company has an arguable case. See *Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd* [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732. Thirdly, security for costs would not be ordered where there is absence of any *mala fide* on the part of the plaintiff

company in bringing its claim. Special attention should be paid to the balance that should be drawn between exposing an innocent defendant to the expense of defending a claim against the risk of shutting out a plaintiff from ventilating a genuine grievance. See *Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd* [1979] 1 LNS 84.

[4] Turning to the facts of the present case, it is clear that the plaintiff company's action against the first set of defendants is based on their alleged breach of fiduciary duties and against the second set of defendants for their voluntarily assisting in such breach. The plaintiff's claim cannot by any stretch of imagination be described as frivolous and vexatious. Its answer to the application for security for costs is that it finds itself in a financially strained position, because of the defendants' acts and omissions. In these circumstances it would, in our judgment, be oppressive to require the plaintiff, the alleged victim of serious wrongs committed upon it, to be required to furnish security for costs in favour of those accused of having put it in the position in which it finds itself.

[5] For the reasons already given, we find merit in these appeals. They are allowed. The orders of the High Court are set aside. The respondent must pay to the appellant the costs of these appeals and those incurred in the court below. By reason of the way in which these appeals were argued before us, we direct the taxing registrar of this court to permit separate items of getting up in respect of each of these appeals. The deposit in court in each appeal shall be refunded to the appellant.